

No. 3771

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARTHA M. JACKSON, executrix of the last
will and testament of Elmer B. Jackson,
deceased,

Plaintiff in Error,

vs.

SUNLIT FRUIT COMPANY (a corporation),

Defendant in Error.

PETITION FOR CORRECTION OF OPINION
AND MODIFICATION OF JUDGMENT.

BURKE CORBET,

JOHN R. SELBY,

First National Bank Building, San Francisco,

*Attorneys for Defendant in Error
and Petitioner.*

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F. B. MONCKTON,
Clerk

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In the opinion filed September 5, 1922, in the above entitled action, inadvertently it is stated that the land described in Exhibit "A" was the community property of Jackson and his wife, and that the land described in Exhibit "B" was the separate property of the defendant to the action, Martha M. Jackson.

As a matter of fact, however, as was pleaded by Mrs. Jackson in her answer, and as shown without dispute by the evidence, and as set forth in the findings of the Court, Exhibit "A" embraced the land which was the separate property of Martha M. Jackson, being seven (7) acres at Bogue Station, and Exhibit "B" embraced the land which was the community property of Elmer B. Jackson and his wife, being the nineteen (19) acres near Oswald.

Correspondingly, the Court in the opinion filed orders judgment for the sum of \$8059.33, which was the amount of damages arising on the breach of Exhibit "A", instead of ordering judgment for the amount of \$36,646.85, which was the amount of damages found by the lower Court arising out of the breach of the contract Exhibit "B", which covered the community property.

The complaint sets forth in paragraph IV (Trans. pp. 21-22), that the contract covering "seven acres near Bogue Station" * * * was "marked Exhibit 'A';" and Exhibit "A" attached to the complaint (Trans. pp. 31-32) describes the property as "Seven (7) acres at Bogue Station".

Correspondingly, the complaint sets forth, in the second count (Trans. pp. 26-27), that Exhibit "B" covered "19 acres near Oswald Station, California"; and Exhibit "B" attached to the complaint (Trans. pp. 33-34), describes the property again as "Nineteen (19) Acres near Oswald".

In her answer Mrs. Jackson pleaded as a separate defense (Paragraph X, Trans. p. 47), that the con-

tract marked Exhibit "A" covered land and crops which "was the separate property of Martha M. Jackson";

And, again, as a separate defense, the defendant pleaded (Paragraph IX, Trans. p. 54), that the land referred to in Exhibit "B" was "community property of said Elmer B. Jackson and said Martha M. Jackson, his wife."

The findings of fact correspond exactly with the pleadings; Exhibit "A", at page 61 of the Transcript, covering 7 acres at Bogue Station, and Exhibit "B" (Trans. p. 63) covering the 19 acres near Oswald; and by Finding VI (Trans. p. 65), the Court finds that the property covered by Exhibit "A" was the separate property of Martha M. Jackson; and by Finding VIII (Trans. pp. 65-66), that the land covered by Exhibit "B" was the community property.

The Court finds that the damages for the breach of Exhibit "A" (Finding XVI, Trans. p. 69) was eight thousand fifty-nine and 33/100 dollars (\$8,059.33); and that the damages for the breach of Exhibit "B" (Findings XX and XXIII, Trans. pp. 72 and 74), was the sum of thirty-six thousand six hundred and forty-seven and 85/100 dollars (\$36,647.85), on account of the breach of the contract for the peaches to be grown on the land and trees near Oswald.

We mention these points specifically, as we went all over the record to make sure that there was no confusion in the record. There is none. In the

opinion filed, the Court simply refers to Exhibit "A" as covering the community property, and Exhibit "B" as covering the separate property, while the reverse is the fact. And the amount of the judgment ordered is \$8059.33, which is the amount found by the lower Court for Exhibit "A". This should be \$36,647.85 for Exhibit "B".

Therefore, it is respectfully submitted that the opinion should be corrected as follows:

The last three paragraphs of page 2 should read:

"The case shows without dispute that the orchard and land embraced by Exhibit 'A' was the separate property of the defendant to the action, Martha M. Jackson.

"The contract contained in Exhibit 'B' was exactly the same in all respects except in the description of the acreage and the number of trees, the acreage being described therein as 'nineteen (19) acres near Oswald', and the number of trees being stated to be 900 of one of the two designated varieties, and 1053 of the other variety.

"The case shows without dispute that the orchard and land embraced by Exhibit 'B' was the community property of Jackson and his wife."

The last paragraph of page 4 should be corrected to read:

"The statute in existence at the time of the execution of Exhibit 'B', and therefore the statute applicable to that contract, was as follows:"

The final paragraph of the opinion should read:

“We are, therefore, of the opinion that the Court below was right in holding the contract set out in Exhibit ‘B’, valid and binding upon the defendant to the action, as executrix of the estate of the deceased Jackson, and finding no valid ground for disturbing the findings and judgment based upon that, the judgment in favor of the plaintiff in the case to the extent and in the sum of \$36,647.85, besides costs, is affirmed, and is reversed with respect to any greater sum. Neither party to recover costs in this Court.”

Wherefore, the defendant in error respectfully prays that the opinion may be corrected accordingly.

Dated, San Francisco,
September 11, 1922.

BURKE CORBET,

JOHN R. SELBY,

*Attorneys for Defendant in Error
and Petitioner.*

